DoD Office of the General Counsel

Updated* Overview of the – …Tension Points (Rubs?) … and Potential Solutions.

WORKING DRAFT

Government-Industry Advisory Panel

***Meeting #8, 27 October 2016**

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DISCLAIMER

The opinions expressed in this briefing are those of the author and do not necessarily represent, and should not be attributed to, the Department of Defense or the United States Government.

OVERVIEW

- **Potential Rubs or Tension Points** ***[as originally briefed Mtg #2]***
  - **From the hill: H.R. 4909, Section 1705**
  - **Other issues**

- **Updated list of Tension Points & Potential Solutions**
  - **Presented at the AIA/NDIA Data Rights Forum (10/20/16)** -- (Theme: "[IP] Strategies & Impact on the Defense Industrial Base")
  - **Panel:** "Sec. 813 Panel and the Impact on Data Rights"
  - **Panelists:** Ralph Nash, Sean O'Brien*, Richard M. Gray*, Darryl A. Scott (** Sec. 813 Gov't-Industry Advisory Panel Members*)

- **Additional Tension Points & Potential Solutions**

Note: Additional details in the Backup Slides

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- **Potential Rubs or Tension Points**
  [as originally briefed Mtg #2]
  - **From the hill: H.R. 4909, Section 1705**
    - **Part 1: Five "Do-overs" regarding Sec. 815 of the FY12 NDAA**
    - **Part 2: Four new elements to better support MOSA (as described in Sec. 1701 of the FY17 NDAA)**
  - **Other issues**

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H.R. 4909 – NDAA FOR FY17 – SEC. 1705

- **From the Hill, Part 1: Five "Do-overs" regarding amendments included in Sec. 815 of the NDAA for FY12**

1) **Authorized release & use of Limited Rights TD:** Segregation/reintegration data amended to be interface data (2320(a)(2)(D)(i)(II))

2) **Mixed Funding:** restore all pre-2012 language (current 2320(a)(2)(E), redesignated as (F))

3) **Deferred Ordering Period: 6yrs** (rather than perpetual) (2320(b)(9))

4) **Deferred Ordering Data Part 1:** only data "generated" under the K (eliminate the "or utilized" criterion) (2320(b)(9))

5) **Deferred Ordering Data Part 2:** all interface or major systems interface data may be ordered, regardless of USG development funding (eliminate segregation/reintegration data) (2320(b)(9)(B)(ii))

H.R. 4909 – NDAA FOR FY17 – SEC. 1705

- **From the Hill, Part 2: Four Additional revisions to 2320 to support Modular Open Systems Approaches MOSA**

1) **Authorized release & use of Limited Rights TD:** includes "data pertaining to an interface between and item or process and other items or processes" (2320(a)(2)(D)(i)(II))

2) **GPR in MSI even if DEPE:** USG will receive GPR in any major system interface (MSI) developed exclusively at private expense (DEPE) and used in a MOSA pursuant to new 10 U.S.C. 2446a (2320(a)(2)(B) and new (a)(2)(E))

3) **GPR in Interfaces Developed with Mixed Funding:** USG gets GPR in all TD pertaining to an interface between and item or process and other items or processes," unless DFARS regs specify criteria to allow other rights –the default GPR applies regardless of Sec. 1705's amendments to the mixed funding paragraph (former ¶ (a)(2)(E), redesignated (a)(2)(F))

4) **GPR in Major System Interfaces (MSI) Developed with Mixed Funding:** default is GPR for all MSI dev'd with mixed funding and used in MOSA pursuant to new 10 U.S.C. 2446a (new 2320(a)(2)(H))

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  - From the hill: H.R. 4909, Section 1705
  - **Other issues**
    - **Evaluating IP: the Emerging Trend to Over-Emphasize "GPR" as the one-size-fits-all path to competion**
    - **Segregation "at the clause level"-- Applying Noncommercial Clauses to Commercial TD/CS**
    - **Flowdown to Commercial "Subcontractors" and/or "Suppliers"**

- Updated list of Tension Points & Potential Solutions
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Evaluating IP: Perils & Pitfalls – Emerging Trend to [Over-] Emphasize "GPR"

- **Example: Evaluate Offerors' willingness to provide "at least Government Purpose Rights (GPR)" …**
  - In ALL deliverable tech data & software…
  - … Perhaps as an Option Item (Option CLIN)
  - … Perhaps in combination with an automatic "plus-up" of evaluated cost/price for deliverables with Less Than < GPR

OK – makes sense if (to the extent) …	But raises concerns if (to the extent) …

• The TD/CS deliverables relate to (or are) –
  • Noncommercial items or software
  • Technology developed either with "mixed funding" or 100% Govt $$
• Deliverables are OMIT data, FFF data, or NCSD (default = Unlimited Rts)
• Offeror (and its team) willing to provide GPR (e.g., as specially negotiated license) for the deliverables … at a competitive price
• Don't Forget! DoD actually **<u>Needs</u>** GPR (e.g., mission needs, ROI on USG invest $$)
	• TD/CS Deliverables relate to (or are)
	  • Commercial items or commercial CS (CCS)
	  • Segregable modules developed 100% at private expense
	• Deliverables are "detailed manufacturing or process data" (DMPD) or source code
	• Offeror (or offeror' subs/suppliers) is not willing to grant GPR … at a competitive $$
	• DoD does not actually need "full" GPR (why unnecessarily limit IP owner's ROI strategy)

MODULAR LICENSING / SEGREGABILITY … "AT THE CLAUSE LEVEL"

- **Selected Excerpt: DFARS 227.7102-4 Contract clauses.**

  "(a)(1) Except as provided in paragraph (b) of this subsection, use the clause at 252.227-7015, Technical Data–Commercial Items, in all solicitations and contracts when the contractor will be required to deliver technical data pertaining to commercial items, components, or processes. (2) * * * * *.

  "(b) In accordance with the clause prescription at 227.7103-6(a), use the clause at 252.227-7013, Rights in Technical Data–Noncommercial Items, ***in addition to*** the clause at 252.227-7015, if the Government will have paid for any portion of the development costs of a commercial item. The clause at 252.227-7013 will govern the technical data ***pertaining to any portion*** of a commercial item that was developed in any part at Government expense, and the clause at 252.227-7015 will govern the technical data ***pertaining to any portion*** of a commercial item that was developed exclusively at private expense."

- **Selected Excerpt: DFARS 227.7103-6(a) Contract clauses.**

  Use …252.227-7013 … when the successful offeror(s) will be required to deliver … [TD] pertaining to noncommercial items, or pertaining to commercial items for which the Government will have paid for any portion of the development costs (in which case …252.227-7013 will govern the [TD] ***pertaining to any portion*** of a commercial item that was developed in any part at Government expense, and …252.227-7015 will govern the [TD] ***pertaining to any portion*** of a commercial item that was developed exclusively at private expense).

- **Question 1: Does this affect the commercial status of the item?**
  - **NO!** This affects only the license rights granted to DoD

- **Rub/Tension: Question 2: Does this apply to commercial SOFTWARE too?**
  - **Not expressly** … although available by analogy, negotiation, etc.

NOTE: RIGHTS IN USG-FUNDED CS (NCS?) THAT LATER BECOMES COMMERCIAL CS (CCS)

- **EXCERPT FROM 1995 DFARS REWRITE FINAL RULE (60 FR 33464, 28 JUN 1995) , RE DEFINITION OF CCS AND USG RETENTION OF RIGHTS FROM DEVELOPMENT K IF CS SUBSEQUENTLY BECOMES COMMERCIAL CS:**

- "8. Computer Software: Thirteen comments addressed computer software. Three commentors suggest the definition of "commercial computer software" is too broad. One also suggests that the definition's broad scope will make it difficult to understand and interpret and contractors will be able to restrict the [*33467] Government's rights in software developed exclusively at Government expense by satisfying one of the criteria that define commercial computer software. Those suggestions are not adopted. The definition of commercial computer software has been modified to reflect requirements in the Federal Acquisition Streamlining Act of 1994. **The Government will not lose rights obtained in software developed at government expense if that software subsequently qualifies as commercial computer software. That situation is covered by 252.227-7014(b)(5) and (c).**

- " Two commentors suggest GSA should amend its rules to permit these regulations to apply to DoD procurements under GSA schedule contracts. That suggestion cannot be accommodated in these DoD specific regulations.

- " Two commentors suggest the criterion for determining whether software is commercial should be the source of development funds rather than the market for which the software was developed. That suggestion is not consistent with the thrust of the Federal Acquisition Streamlining Act of 1994.

- " A commentor suggests there may be a conflict between the definition of commercial computer software, which might include software developed with Government funds, and the policy in 227.7202-1(a) to acquire commercial computer software and documentation under the licenses customarily provided to the public. **If Government funds are used to develop software or documentation, the development contract will determine the Government's rights in that software or documentation. Those rights are protected if the software subsequently qualifies as commercial software**. The commentor expresses concern that when both commercial and noncommercial software are deliverable under a contract, the requirements in 252.227-7014 will be applied to the commercial software. That result is not intended. The clause title, "Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation", clearly indicates that the clause is not applicable to commercial software or documentation . The commentor's suggestion to define commercial computer software documentation in terms of development at private expense is unnecessary and not adopted."

SUBCONTRACTORS (SUBKORS)

- **DFARS 227.7103-15, and .7203-15: "Subcontractor rights in [TD and CS]," respectively**
  - 2320 & 2321 provides same protections to subKors at all tiers – both refer to "contractor or subcontractor" throughout
  - 2321 expressly permits subKor transact direct w/USG re validation

- **Commercial Subcontractors**
  - 2320 and 2321 expressly refer to commercial items
  - Note: 2321(f) addresses presumptions expressly in the context of Kors/subKors for commercial items

- **"Subcontractor" vs. "Supplier"?**
  - **227.7101(a) and .7201(a):** "As used in this subpart, unless otherwise specifically indicated, the terms "offeror" and "contractor" include an offeror's or contractor's subcontractors, suppliers, or potential subcontractors or suppliers at any tier."

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SECTION 813(B) PANEL

Mandate (FY16 NDAA (P.L. 114-92))

Review 10 USC §§ 2320 and 2321 and implementing regs for the purpose of ensuring that such requirements are best structured to serve the interests of the taxpayers and the national defense

Consider the following factors:

(1) Ensuring DoD does not pay more than once for the same work

(2) Ensuring DoD contractors are appropriately rewarded for innovation and invention

(3) Providing for cost-effective reprocurement, sustainment, modification, and upgrades to DoD systems

(4) Encouraging private sector to invest in new products, technologies, and processes relevant to DoD missions

(5) Ensuring DoD has appropriate access to innovative products, technologies, and processes developed by private sector for commercial use

<u>FY17 NDAA (House bill) §1705 additions</u>:

Develop recommendations for changes to §§ 2320 and 2321 and implementing regs

Also consider (6) ensuring that DoD and DoD contractors have data rights necessary to support the modular open system architecture requirement set forth in [House bill §1701]

SECTION 813 PANEL

Points of discussion

Some Identified Frictions

1. GPR: scope, sunset, DoD default ask
2. Data rights as an evaluation factor
3. Development (versus adaptation)
4. Form, fit, & function (vs. segregation/ reintegration or interface) data
5. OMIT (versus detailed manufacturing or process) data
6. Modular open systems approaches (MOSA)
7. Deferred (versus defined) ordering
8. Depot Level Maintenance capability / req'ts
9. Loss of (sustainment) support
10. Legacy programs vs. new-starts
11. Software vs. technical data
12. Commercial items vs. noncommercial
13. Mandatory flow down (commercial subs & suppliers)

Some Potential Solutions

A. Revisit funding-based rights allocation
B. Revisit three basic rights constructs – add new rights levels (LR < [new] < GPR)
C. Encourage SNLR (templates?)
D. Define standard deliverables
E. Contingent and/or phased licenses
F. Escrow
G. Automatic and/or "constructive" delivery for DoD-funded development
H. MOSA
I. Longer-term priced contract options
J. PGI

RECOMMENDATIONS FOR THE 813 PANEL

Ralph C. Nash – forthcoming article in N&C Report

- **Keep Separate Policy/Regs for Tech Data & Comp Software**
  - 813 Panel charter limited to TD, but must consider & integrate CS
- **Tech Data: revisit funding-based allocation of rights**
  - Advance assessment, evaluation, and planning for entire life cycle sustainment
  - Contractor establishes and qualifies ≥2 sources for life-cycle competition – regardless of funding; no TD delivered to DoD, but continuous requalify sources
  - Life Cycle competition strategy implemented via contract requirements
  - Escrow for contingencies (bankruptcy, discontinued product/support)
- **Computer Software: update for Open Source Software**
  - *DoD Open Architecture Contract Guidebook for Program Managers*
- **Research Contracts: streamlined clause for reports**
- **Carpe Diem!**

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